### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

AMERICAN BENEFIT CORPORATION

and

Case Nos. 9-CA-44679 and 9-CA-44701

TEAMSTERS LOCAL UNION NO. 505, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

# EXCEPTIONS OF AMERICAN BENEFIT CORPORATION TO ADMINISTRATIVE LAW JUDGE'S DECISION

American Benefit Corporation (hereinafter referred to as "American Benefit") takes exception to the "Decision and Recommended Order" issued by Administrative Law Judge David I. Goldman (hereinafter referred to as the "ALJ's Decision") on July 2, 2009, as follows:

Exception No. 1: The ALJ's conclusion that American Benefit violated Section 8(a)(1) and (5) of the Act by hiring temporary employees is incorrect inasmuch as American Benefit had no obligation to bargain with the Union because the Union waived its right to bargain over this issue.

Exception No. 2: The ALJ's conclusion that American Benefit violated Section 8(a)(1) and (5) of the Act by hiring temporary employees is incorrect inasmuch as in order to reach such conclusion, the ALJ inserted terms into the unambiguous language of the collective bargaining agreement between American Benefit and the Union.

Exception No. 3: The ALJ's conclusion that American Benefit violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide and/or timely provide information requested by the Union is incorrect inasmuch as there was no evidence presented showing that the requested information was relevant to and necessary for the Union's role as the collective bargaining representative for American Benefit's employees.

WHEREFORE, American Benefit requests that the Board reject the ALJ's Decision and find that no violation of the Act occurred in this matter.

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# BRIEF IN SUPPORT OF EXCEPTIONS OF AMERICAN BENEFIT CORPORATION TO ADMINISTRATIVE LAW JUDGE'S DECISION

In support of its' "Exceptions of American Benefit Corporation to Administrative Law Judge's Decision," American Benefit Corporation (hereinafter referred to as "American Benefit") states as follows:

#### I. STATEMENT OF THE CASE

On or about November 7, 2008, the Union filed an unfair labor practice charge which was designated as Case 9-CA-44679. This charge was subsequently amended on both November 19, 2008 and December 1, 2008. See General Counsel's Ex. 1(a), 1(c), and 1(g). The second amended charge alleges that "[s]ince on or about October 15, 2008, [American Benefit] has unilaterally subcontracted, transferred or diverted bargaining unit work without prior notice or bargaining with the Union in violation of the collective bargaining agreement and other agreements." See General Counsel's Ex. 1(g). The Union alleges that these actions constitute violations of Sections 8(a)(1) and (5) of the National Labor Relations Act (hereinafter referred to as the "Act"). Id.

On or about December 1, 2008, the Union filed a separate unfair labor practice which was designated as Case 9-CA-44701. This charge alleges that "[s]ince on or about November 19, 2008, [American Benefit], through its representative Patty Bostic, has failed and refused to respond to an information request made by the Union on November 19, 2008, wherein the Union requested relevant and necessary information concerning the subcontracting, transferring or diverting of unit work, and the information request was related to grievance previously filed on or about November 7, 2008 concerning the unilateral subcontracting, transferring or diverting of unit work in violation of the parties collective bargaining agreement, Memorandum of Agreement, a prior grievance settlement, and in violation of Section 8(a)(5) of the Act." *See* General Counsel's Ex. 1(e). The charge also alleges that American Benefit "... failed and refused to respond to the request for information in a timely manner." *Id*.

American Benefit responded to each of these charges and provided the requested information to the Regional Director. American Benefit contended that its' actions did not constitute unfair labor practices and requested that these two matters be dismissed. However, on or about February 9, 2009, the General Counsel issued an "Order Consolidating Cases, Consolidated Complaint and Notice of Hearing" (hereinafter referred to as the "Complaint"). *See* General Counsel's Ex. 1(i).

With regard to the allegations set forth in Case 9-CA-44679, the Complaint alleges that "[f]rom about October 18, 2008 through November 21, 2008, [American Benefit] subcontracted, transferred or diverted Unit work by having non-Unit individuals perform certain medical and dental claims processing work outside of Respondent's facility." *Id.* at ¶7(a). Further, the General Counsel alleges that American Benefit took

such action "... without prior notice to the Union and without affording the Union an opportunity to bargain ... with respect to this conduct and the effects of this conduct." *Id.* at ¶7(b).

With regard to the allegations set forth in Case 9-CA-44701, the Complaint alleges that "[s]ince about November 19, 2008, the Union, by letter, has requested that [American Benefit] furnish the Union with the following:

- (i) Any and all documents that show the date [American Benefit] contacted the individuals [American Benefit] contends are temporary employees to do work that is or has been performed by bargaining unit employees;
- (ii) The names, addresses and phone numbers for any and all individuals [American Benefit] contends are temporary employees doing work that is or has been performed by bargaining unit employees;
- (iii) Any payroll records, W-2 forms and other documents that show earnings by temporary employees, and any records showing all hours worked, including any hours considered or paid as overtime, by each temporary employee;
- (iv) Any and all applications, resumes, curriculum vitas or other information submitted by individuals that [American Benefit] either considered for hire or did in fact hire as temporary employees. This information should also include any and all documents and/or information that shows which individuals [American Benefit] interviewed and any results of those interviews and the basis for which the decision to hire was made;
- (v) Any and all documents and information that show how [American Benefit] initially contacted any and all temporary employees that were hired by [American Benefit];
- (vi) The closest office of [American Benefit] for each temporary employee hired by [American Benefit];
- (vii) Any and all information that shows how work was sent out either in electronic form or otherwise to these temporary employees;
- (viii) Any and all information that shows what work was sent out either in an electronic form or otherwise to these temporary employees, including all dates on which the work was sent to these temporary employees;

- (ix) Any and all information that shows how the work was returned to [American Benefit] by these temporary employees in either a completed or incomplete form, the dates that the work was returned and the person or persons to whom the work was returned;
- (x) Any and all information that shows which claims that came into the office in written form were removed from the desks of employees on or about October 11, 2008 and sent out to temporary employees, and all documents that state the reason for the removal and transfer of the work; and
- (xi) Any and all information that shows to whom the work was sent, including their names, addresses, phone numbers and their rate of pay and benefits for the work performed."

Id. at ¶8(a). The Complaint further alleges that this information requested by the Union "is necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the Unit" and that "since about December 5, 2008, American Benefit has failed and refused to furnish the requested information to the Union." Id. at ¶¶ 8(b) and 8(c).

Finally, the Complaint alleges that American Benefit's actions in allegedly subcontracting, transferring, and/or diverting bargaining unit work and failing and/or refusing to provide the Union with the requested information amounts to a failure and/or refusal "to bargain collectively with the exclusive bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act." *Id.* at ¶9.

On or about February 27, 2009, American Benefit filed "Answer to Consolidated Complaint on Behalf of American Benefit Corporation. See General Counsel's Ex. 1(k). American Benefit denied that it committed any of the alleged unfair labor practices and demanded strict proof of such alleged unlawful acts.

The hearing in this matter was held on April 28 and 29, 2009. The General Counsel, the Union, and American Benefit all appeared and were afforded the

opportunity to present witnesses and evidence in support of their respective positions. The hearing was closed on April 29, 2009. The parties' briefs in support of their respective positions were filed on June 3, 2009.

On July 2, 2009, the ALJ issued his Decision and Recommended Order (hereinafter referred to as "ALJ's Decision") in this matter. The ALJ's Decision concluded that American Benefit "violated Section 8(a)(1) and (5) of the Act by unilaterally transferring bargaining unit work to offsite temporary nonbargaining unit employees on or about October 18, 2008, without notifying the Union or providing the opportunity to bargain." ALJ's Decision at p.32. The ALJ's Decision also concluded that American Benefit "violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide information requested by the Union and relevant to the Union's representational duties." ALJ's Decision at p.33. Finally, the ALJ's Decision concluded that American Benefit "violated Section 8(a)(1) and (5) of the Act by delaying the furnishing of information requested by the Union and relevant to the Union's representational duties." *Id.* It is from these conclusions that American Benefit takes exception.

#### II. STATEMENT OF RELEVANT FACTS

American Benefit is a third party administrator for various health and welfare funds and pension funds. Tr. at 246-247. Several of these funds are administered for various unions. *Id.* American Benefit currently employs approximately 35 bargaining unit employees. Tr. at 24. The dental and medical claims that are at issue in this case are handled by the claims department. Linda Sites, American Benefit's Claims Manager,

testified that she is responsible for the operations of the claims department, which is made up of approximately seventeen (17) bargaining unit employees, consisting of two (2) lead auditors, twelve (12) auditors, two (2) clerks, and one (1) data entry clerk. Tr. at 138-139. Ms. Sites testified that the auditors, which are also referred to as claims examiners actually adjudicate claims in accordance with each of the group's benefit structure. Tr. at 139. While the auditors are generally cross trained on all of the different entities or groups for which American Benefit provides services, each auditor is generally assigned to work a specific group. Tr. at 139-140. However, Ms. Sites testified that clerks do not perform the same type of work as the auditors and in fact are not qualified to perform that type of work. Tr. at 140-141.

As American Benefit's Chief Financial Officer, Ryan Jones, testified, American Benefit lagged severely behind other third party administrators of its size in terms of technology and electronic processing of claims when the company was purchased by its current owner in 2006. Tr. at 246. Shortly after American Benefit was purchased by its current owner, it entered into an arrangement with Anthem in an effort to become more competitive by being able to secure better discounts for the health and welfare funds that it administers. Tr. at 248-251. As part of this arrangement, American Benefit had to purchase new electronic claims processing software that would allow it to better interface with Anthem. Tr. at 251. The software system purchased by American Benefit is referred to as Basys. *Id.* As Mr. Jones testified, the purchase of the Basys software was an investment of over One Million Dollars (\$1,000,000). *Id.* 

American Benefit went live with Anthem and Basys in January 2008 with one of the funds it administers. Tr. at 146. By the summer of 2008, American Benefit had two other funds that have moved over to Anthem. Id. In mid-October, representatives from Anthem contacted American Benefit and informed it that it was woefully behind where it was required to be by contract with regard to its speed of claims processing, or claims lag. Tr. at 256-257. That is it was not processing claims quickly enough. In fact, American Benefit learned that its claim lag was over 30 days for certain of its funds that were operating under the Anthem system. Id. Under its contract with Anthem, American Benefit was required to keep its claim lag at less than fourteen (14) days. Id. Mr. Jones testified that he asked Anthem for a period of thirty (30) days to get its claim lag improved to the required 14 days. Id. According to Mr. Jones, this satisfied Anthem and he was given thirty (30) days to correct the issues. At that time, American Benefit's management attempted to develop a plan to correct these issues. Tr. at 144-145. Mr. Jones did some analysis and determined that it would likely take an additional eleven (11) work days above and beyond the normal work schedule to get the fund that was so behind in its claim lag up to the required fourteen (14) days. Tr. at 257-260; See Employer's Ex. 1 and 2.

At that point, American Benefit asked its employees to work overtime in an effort to improve on the claims lag. Tr. at 145, 260-266. However, as Mr. Jones and Ms. Sites testified, only one employee signed up to work overtime and even that employee later came back and took his name off of the list. *Id.* It was American Benefit's understanding that the bargaining unit employees were upset that there were a few employees on layoff and the company was asking the current employees to work overtime. Under the terms of the collective bargaining agreement between American

Benefit and the Union, all overtime is voluntary.<sup>1</sup> Tr. at 147. Thus, American Benefit determined that it was no other option but to utilize temporary employees to get caught up on its claims or it faced the possibility of losing its arrangement with Anthem and the groups that had signed up with Anthem. Tr. at 144.

As a result, American Benefit hired two (2) temporary employees to process medical claims. Tr. at 148-149, 266-268. These individuals were referred to American Benefit by Basys, as individuals who had experience with the Basys software system and experience in dealing with Anthem. Tr. at 266-268. One of these individuals was utilized for just less than thirty (30) days and the other was used for much less time. Tr. at 268. As a result of using these temporary employees, American Benefit was able to get its' claims lag within an acceptable limit within the thirty (30) day period that it had set with Anthem. Tr. at 151-152.

Around this same time, American Benefit determined that it was also considerably behind in the processing of its dental claims. Tr. at 269-270. As a result, American Benefit decided that it would attempt to see if it could sell the dental work inasmuch as it was not very profitable. *Id.* American Benefit approached a local company by the name of Benefit Assistance Corporation, which performs similar work for other clients. *Id.* When Benefit Assistance Corporation stated that it was not intereste3d in purchasing this part of American Benefit's business, Mr. Jones asked whether he could approach some of Benefit Assistance Corporation's employees about doing some weekend or after hours work to help American Benefit get its dental claims caught up. Tr. at 270-271. Benefit Assistance Corporation gave Mr. Jones permission to

<sup>&</sup>lt;sup>1</sup> Article 37, Section 4 of the collective bargaining agreement provides that "[i]t shall not be cause for disciplinary action or discharge for an employee to refuse to work overtime. Overtime work shall be on a

approach its employees to see if they were interested in doing some after hours or weekend work. *Id.* There were several of those individuals who were interested. *Id.* However, only five (5) individuals actually processed any dental claims for American Benefit. Tr. at 270-272. As Mr. Jones testified, these individuals were hired directly by American Benefit and Benefit Assistance Corporation was not involved other than to advise its employees that American Benefit was seeking individuals for after hours or weekend work. *Id.* These five (5) individuals only worked one weekend and American Benefit did not utilize them any further. *Id.* American Benefit made the decision not to utilize these individuals any further because this arrangement was not as productive as it had hoped. *Id.* 

#### III. EMPLOYER'S EXCEPTIONS TO THE ALJ'S DECISION

Exception No. 1: The ALJ's conclusion that American Benefit violated Section 8(a)(1) and (5) of the Act by hiring temporary employees is incorrect inasmuch as American Benefit had no obligation to bargain with the Union because the Union waived its right to bargain over this issue.

The ALJ erred by finding that American Benefit violated Section 8(a)(1) and (5) of the Act when it hired temporary employees in October and November of 2008 inasmuch as American Benefit had no obligation to bargain with the Union over such issue based on the express language of the collective bargaining agreement. It is well settled that a party may contractually waive its right to bargain about a subject. *Druwhit Metal Prods. Co.*, 153 N.L.R.B. 346 (1965); *Ador Corp.*, 150 N.L.R.B. 1658 (1965). In *Amoco Chem. Co.*, 328 NLRB 1220 (1999), *enforcement denied sub nom. BP Amoco v. NLRB*, 217 F.3d 869 (D.C. Cir. 2000), the Board repeated its longstanding position,

voluntary basis." See General Counsel's Ex. 2 at p.20.

quoting from the Supreme Court's 1983 decision in *NLRB v. Metropolitan Edison*, 460 U.S. 693, 708 (1983), "either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter." *Amoco Chem. Co.*, 328 NLRB 1220, 1221–22 (emphasis added).

In this case, the contract language that American Benefit relies on to establish that the Union has waived its' right to bargain over the issue of hiring temporary employees is very specific in that it sets forth the conditions under which American Benefit can hire temporary employees. Specifically, Article 31 of the collective bargaining agreement between American Benefit and the Union provides that "[t]he Union recognizes the need for the Company to use outside temporary employees in cases where the workload is of an immediate nature such that it cannot be completed by regular employees during the normal work day or during overtime hours." *See* General Counsel's Ex. 2 at p. 15. This language clearly and unambiguously grants American Benefit the right to utilize temporary employees where the work is of an immediate nature and cannot be completed by the regular employees during normal work hours or overtime. Nothing further is required.

As a part of the duty to bargain, employers are generally prohibited from the imposition of unilateral changes to the existing terms or conditions of employment unless – the subject has been bargained to impasse [Industrial Elec. Reels Inc., 310 N.L.R.B. 1069 (1993)]; a management rights clause gives the employer the right to make such changes [NLRB v. U.S. Postal Serv., 8 F.3d 832 (D.C. Cir. 1993)]; or the union has waived its right to bargain [Allied-Signal Inc., 307 N.L.R.B. 752 (1992)]. The NLRB has

found that in agreeing to certain language, a union may waive its right to bargain over subcontracting. See e.g., Kennecott Copper Corp., 148 N.L.R.B 1653 (1964); Shell Oil Co., 149 N.L.R.B. 283 (1964); General Motors Corp., 149 N.L.R.B. 396 (1964); Druwhit Metal Products Co., 153 N.L.R.B 561 (1965).

In support of his conclusion that American Benefit violated Section 8(a)(1) and (5) by hiring temporary employees, the ALJ appears to accept the General Counsel's and Union's argument that the hiring of temporary employees by American Benefit in October and November 2008 amounts to unilateral subcontracting. ALJ Decision at p.16. American Benefit disagrees with the characterization of the hiring of temporary employees as unilateral subcontracting. However, even assuming that the hiring of temporary employees is deemed to be subcontracting, the Union has clearly waived any right to bargain over the issue of American Benefit's right to hire temporary employees under certain conditions inasmuch as Article 31 grants American Benefit such right. Article 31 does not require that American Benefit bargain with the Union and/or provide the notice Union notice of its intent to use temporary employees.

As the facts set forth above illustrate, American Benefit had no choice but to utilize temporary employees to catch up on its claims processing or it faced the possibility of losing its clients who had signed up with Anthem, which accounted for a substantial portion of American Benefit's business. The bargaining unit employees were offered overtime and they refused it because they were apparently upset that there were employees on lay off and the company was offering overtime. It appears that the Union was upset that these employees were on lay off and that they wanted them to be recalled. However, the Company has the right to determine when and if it needs to recall

employees. As a result, American Benefit was forced to exercise its' contractual right to utilize temporary employees, which it did. American Benefit took no action which violated the terms of the collective bargaining agreement. Accordingly, American Benefit did not engage in any unfair labor practice under Section 8(a)(1) or (5) of the Act, but simply acted in accordance with its' contractual rights.

In determining that American Benefit somehow committed an unfair labor practice, the ALJ accepts the General Counsel and the Union's argument that the June 8, 2006 Memorandum of Agreement regarding subcontracting, which is contained in the parties' collective bargaining agreement, somehow supersedes Article 31. However, such a conclusion is entirely incorrect. First of all, according to testimony given at the hearing in this matter by the Union's Business Agent Dennis Morgan, Article 31 was in the contract prior to the addition of the Memorandum of Agreement during the 2006 negotiations. Tr. at 91. Secondly, Article 31 was not removed from the collective bargaining agreement when the Memorandum of Agreement was added during the 2006 negotiations. Id. And lastly, the Memorandum of Agreement does not state that it supersedes any other provision of the collective bargaining agreement as is specifically stated in another Memorandum of Agreement (regarding vacations), which is also contained in the parties' collective bargaining agreement. In order to accept this interpretation of the Memorandum of Agreement, Article 31 has to be rendered meaningless. However, doing so is contrary to one of the basic tenants of contract construction which is that all portions of the contract must be given meaning.

Moreover, the Memorandum of Agreement deals with specific instances where non-bargaining unit employees were performing work that was bargaining unit work

according to the terms of the collective bargaining agreement. These specific instances were not situations where such work was being done temporarily because of an immediate need, but were situations that were much more permanent and long-term. To the extent that the issues dealt with in the Memorandum of Agreement were similar to what occurred in this matter, i.e., the hiring of temporary employees, the Memorandum of Agreement would not have been necessary and the parties would have resorted to interpretation of the language of Article 31 instead of adding new language. Thus, the suggestion that the Memorandum of Agreement somehow trumps and/or renders void Article 31 is without merit. Accordingly, the ALJ erred in finding that the Memorandum of Agreement prevents American Benefit from utilizing the language of Article 31. ALJ's Decision at p.21.

Furthermore, the ALJ incorrectly notes in footnote 12 that American Benefit does not dispute that the clear and unmistakable waiver rule is the correct rule to apply to determine whether there was a waiver of the duty to bargain over the hiring of temporary employees. ALJ's Decision at p.19. A reading of American Benefit's brief to the ALJ would indicate otherwise. In fact, in its brief, American Benefit clearly noted that while the clear and unmistakable waiver rule was the current standard used by the Board in making such determinations, Article 31 also constitutes a waiver under contract coverage rule that has been adopted by certain circuit courts. Specifically, American Benefit stated that:

It should also be noted that the Union waived its right to bargain over the issue of temporary employees under the "contract coverage" analysis that has been adopted by certain circuit courts. See, e.g., NLRB v. Postal Service, 8 F.3d 832 (D.C. Cir. 1993) (court denied enforcement of the Board's finding of a Section 8(a)(5) violation where Board had found the employer's unilateral reduction in service hours was unlawful, rejecting

arguments that a broadly worded management-rights clause was sufficiently specific to constitute a waiver of the union's right to bargain); Department of Navy v. FLRA, 962 F.2d 48, 57 (D.C. Cir. 1992)(applying contract coverage analysis under federal service labor-management relations statute); Chicago Tribune Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992)("[o]f course people should not be tripped into forgoing valuable rights, but where as in this case a union agrees to a broadly worded management-rights clause the scope of that clause depends on the usual principles of contract interpretation rather than on a doctrine that tilts decision in the union's favor"); Electrical Workers (IBEW) Local 47 v. NLRB, 927 F.2d 635, 641 (D.C. Cir. 1991)(if "contract fully defines the parties" rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant").

Thus, the ALJ's contention that American Benefit conceded that this case should be decided under the clear and unmistakable waiver standard is not accurate. In fact, American Benefit argued that the Union had waived its right to bargain over the issue of hiring temporary employees under either standard.

Based on the foregoing, it is American Benefit's position that the Union waived its right to bargain over the issue of temporary employees. Accordingly, the ALJ erred in concluding that American Benefit violated Section 8(a)(1) and (5) of the Act by hiring and utilizing temporary employees in October and November of 2008.

Exception No. 2: The ALJ's conclusion that American Benefit violated Section 8(a)(1) and (5) of the Act by hiring temporary employees is incorrect inasmuch as in order to reach such conclusion, the ALJ inserted terms into the unambiguous language of the collective bargaining agreement between American Benefit and the Union.

In order to reach the conclusion that American Benefit violated Section 8(a)(1) and (5) of the Act by hiring temporary employees, the ALJ artificially inserts terms into

the clear and unambiguous language of Article 31 of the collective bargaining agreement. Specifically, the ALJ found that "Article 31 does not expressly treat with the issue of whether temporary employees envisioned by the clause can work at noncompany locations on bargaining unit work sent out of the facility." ALJ's Decision at p.21. In doing so, the ALJ apparently accepts an argument advanced by the General Counsel and the Union that any worked performed by American Benefit's employees must be performed at American Benefit's facilities at or near Huntington, West Virginia. However, there is absolutely no evidence of record to support the inclusion of this term into the clear and unambiguous language of Article 31.

In fact, there is nothing in the language of the collective bargaining agreement that requires that work be performed at American Benefit's facilities in or near Huntington, West Virginia. During cross-examination at the hearing, the Mr. Morgan was unable to identify any language in the parties' collective bargaining agreement which would prevent American Benefit from having work performed outside of its' facilities in or near Huntington, West Virginia. Tr. at 88-90. The only portion of the collective bargaining agreement that Mr. Morgan could identify was the Maintenance Clause which provides that "[t]he Company intends to maintain all existing physical conditions and normal working benefits at not less than the highest minimum standards in effect at the time of the signing of this agreement, except that nothing in this provision shall take precedence over or detract from the rights granted in the Management Rights Clause, Article 8." [General Counsel's Exhibit No. 2 at p. 6] *Id.* However, nothing in this language evenly remotely addresses American Benefits ability to direct where work is to be performed or requires that it only be performed at American Benefit's facilities in or

near Huntington, West Virginia. Thus, by adding the requirement that temporary employees hired pursuant to Article 31 must perform work at American Benefit's Huntington facility, the ALJ is inserting terms to the clear and unambiguous language that was agreed to by the parties during negotiations to the collective bargaining agreement. Accordingly, the ALJ's reasoning necessary to find a violation of Section 8(a)(1) and (5) of the Act is flawed.

Exception No. 3: The ALJ's conclusion that American Benefit violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide and/or timely provide information requested by the Union is incorrect inasmuch as there was no evidence presented showing that the requested information was relevant to and necessary for the Union's role as the collective bargaining representative for American Benefit's employees.

American Benefit did not violate Section 8(a)(1) and (5) of the Act in refusing to provide and/or refusing to timely provide the Union with the information requested by the Union in the information request dated November 19, 2008. As Mr. Morgan admitted at the hearing in this matter, American Benefit initially responded to the November 19, 2008 information request by letter dated November 25, 2008. Tr. at 39-40; *See* General Counsel's Ex. 7. As Mr. Morgan testified, this letter stated that it was American Benefit's position that the information request was overly broad and not relevant to the Union's role as the collective bargaining representative of its employees. *Id.* However, as Mr. Morgan also testified, the November 25, 2008 letter went on to state that it needed additional time to assess and respond to the information request. *Id.* Thus, the letter stated that American Benefit would respond to the information request by December 5, 2008. *Id.* However, apparently that was not soon enough for the Union inasmuch as it filed Case 9-CA-44701 on December 1, 2008. *See* General Counsel's Ex. 1(e). Thus, the

Union was not acting in good faith in its dealings with American Benefit inasmuch as it filed an unfair labor practice charge prior to the brief extension requested by American Benefit to assess and respond to the information request. The Union filed the unfair labor practice charge prior to even seeing what information American Benefit was willing to provide and/or attempt to work these issues out without intervention of the Board.

By letter dated December 5, 2008, American Benefit provided the Union with the information that it felt was relevant to and necessary for the Union's role as the collective bargaining representative of its employees. *See* General Counsel's Ex. 8. Despite being dated December 5, 2008, Mr. Morgan testified that this letter was not faxed to him until December 8, 2008. Tr. at 40-42. This information included the dates the temporary employees were used, the type of work performed by the temporary employees, the number of hours worked, the rate of pay, and the fact that the temporary employees were not provided with benefits beyond the compensation paid to them. *See* General Counsel's Ex. 8. The letter also informed the Union how the temporary employees were generally provided with work. *Id*.

The ALJ's Decision does not reference any evidence presented by the General Counsel or the Union regarding how the other information requested is relevant to and/or necessary for the Union in its role of representing American Benefit's employees. The ALJ's Decision appears to simply accept the fact that the Union is entitled to such information because it was requested. However, according to the litany of cases cited by the ALJ, such is not the standard, but the Union must show how the information requested is relevant to and necessary for its representational duties. The Union simply

failed to submit any such proof. Accordingly, the ALJ erred by finding that American

Benefit unlawfully refused to provide such information.

Furthermore, the ALJ's Decision that American Benefit failed to timely provide

the Union with the requested information is also flawed because such a finding is

necessarily premised on the fact that the Union has shown that it is entitled to the

information requested. As a result, the ALJ also erred in determining that American

Benefit failed to timely provide the requested information.

WHEREFORE, American Benefit requests that the Board reject the ALJ's

Decision and find that no violations of Section 8(a)(1) and (5) the Act occurred in this

matter.

AMERICAN BENEFIT CORPORATION

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#### CERIFICATE OF SERVICE

I, Michael E. Estep, counsel for American Benefit Corporation, hereby certify that on August 31, 2009, I electronically served a copy of the foregoing "Exceptions of American Benefit Corporation to Administrative Law Judge's Decision" and "Brief in Support of Exceptions of American Benefit Corporation to Administrative Law Judge's Decision" upon the following counsel of record:

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